Murderers' parole eligibility : judicial review

Background Paper **BP-348E**

MURDERERS' PAROLE ELIGIBILITY: JUDICIAL REVIEW

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October 1993
Revised April 1996

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Catalogue No. YM32-2/348-1996-04E
ISBN 0-660-16557-0

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

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INTRODUCTION

Section 745 of the *Criminal Code* gives convicted murderers limited access to the courts to seek a reduction in the number of years to be served in prison before eligibility for release on parole. Since the first review was undertaken in 1987, a total of 63 review applications have been heard from lifers seeking early parole eligibility. During that time, Canadian newspapers have carried numerous stories about convicted murderers' bids for early release from prison.[1] Media accounts of these proceedings have often included complaints from victims' families, and there have also been calls for the repeal of s. 745, which some argue "was passed at a time when the country was pre-occupied with the debate over capital punishment, rather than the appropriate number of years of incarceration for murder."[2] Others, however, maintain that a 25-year parole ineligibility period may be cruel and unusual punishment and, given the rate at which lifers are accumulating in Canadian penitentiaries, that either Parliament or the courts must soon address "the legitimacy of long term confinement."[3]

Although the last execution in Canada took place more than 30 years ago, capital punishment was not formally abolished until 1976, after years of public and parliamentary debate.[4] Section 745 of the *Criminal Code* was part of the package of reforms that did away with the death

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(1) See: "Criminals Have All the Rights," *Winnipeg Sun*, 10 September 1993; "King Murderer Eligible for Parole Review," *The Star-Phoenix* (Saskatoon), 11 September 1993; "Crime and Punishment," *Globe and Mail* (Toronto), 4 July 1992; "Jury Allows Killer Dad to Apply for Early Parole," *Toronto Star*, 5 March 1996.

(2) Lorrie Goldstein, *Toronto Sun*, 16 January 1990.

(3) Allan Manson, "The Easy Acceptance of Long-Term Confinement in Canada," (1990) 79 C.R. (3d) 265; however, in *R.* v. *Luxton* (1990) 79 C.R. (3d) 193, the Supreme Court of Canada held that 25 years of parole ineligibility for first degree murder was not cruel and unusual punishment.

(4) *Ibid.*, at p. 266.

penalty. This paper examines the judicial review procedure established by s. 745, with reference to the abolition process and the sentences served by convicted murderers prior to its introduction.

SENTENCING OF CONVICTED MURDERERS

In Canada, murder was first classified as capital or non-capital in 1961; before then, only one punishment had been prescribed for murder and that was death, although the sentence could be commuted by the Governor in Council to imprisonment for life or a lesser term.[5] After 1961, only capital murder, which included homicide that was "planned and deliberate," or that caused the death of a police officer or prison guard, was punishable by death.[6] Later *Criminal Code* amendments further restricted capital murder or murder "punishable by death" to the killing of police officers or prison guards. Ten years of a (commuted) life sentence for capital murder had to be served before the Parole Board could recommend parole and the inmate would not be released without the prior approval of the Governor in Council. Persons convicted of non-capital murder were sentenced to life but were eligible for parole after seven years.[7] After 1967, all those serving a life sentence for murder (either capital or non-capital) needed approval of the Governor in Council prior to release and could not be recommended for parole before serving at least 10 years.[8] *Criminal Code* amendments in 1974 allowed the sentencing judge to increase the parole ineligibility period to a maximum of 20 years.[9]

On 24 February 1976, the Solicitor General introduced Bill C-84. It abolished the death penalty for *Criminal Code* offences and created two new categories of murder, first and second degree, both of which carried a minimum sentence of life imprisonment.[10] Those convicted of first degree murder would have to serve 25 years before being eligible for parole.

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(5) *Criminal Code*, S.C. 1953-54, Chap. 51, s. 206, s. 656.

(6) *An Act to amend the Criminal Code (Capital Murder)*, S.C. 1960-61, Chap. 44, s. 206.

(7) *Parole Regulations*, SOR/64-475, 23 December 1964.

(8) *Parole Regulations*, SOR/68-21, 24 January 1968.

(9) *Criminal Law Amendment (Capital Punishment) Act*, S.C. 1973-74, C. 38, s. 3.

(10) The distinction between first and second degree murder continues to the present. First degree murder includes murder that is "planned and deliberate," murder of police officers or prison guards acting in the course of their duties, and murder committed during the course of certain listed offences. See: *Criminal Code*, R.S.C. 1985, Chap. C-46, s. 231.

Those convicted of second degree murder would serve between 10 and 25 years prior to parole eligibility, as determined by the sentencing judge. The 25-year parole ineligibility period has been characterized as the "trade-off" or necessary expedient to achieving abolition.[11] Between 1968 and 1974, death sentences commuted to life imprisonment had resulted in an average of only 13.2 years served prior to release on parole.[12] Thus, Bill C-84 brought about a significant increase in the term of imprisonment that convicted murderers could expect to serve before parole eligibility.

"FAINT HOPE" PAROLE[13]

At first reading, clause 21 of Bill C-84 contained a provision allowing those ineligible for parole for more than 15 years to apply for a reduction in their number of years of ineligibility, after serving at least 15 years of their sentence. This provision was described by Jim Fleming, then Parliamentary Secretary to the Minister of Communications, as a very important "glimmer" of hope, "if some incentive is to be left when such a terrible penalty is imposed on the most serious of all criminals."[14]

In the bill's original version, application for a reduced period of parole ineligibility would have been heard and determined by a panel of "three judges of the superior court of criminal jurisdiction" designated by the Chief Justice of the province or territory in which the conviction had taken place. The Standing Committee on Justice and Legal Affairs subsequently adopted amendments that would require the review decision to be made by a two-thirds majority of a jury empanelled for the purpose. The current provisions of s. 745 are as follows:

> *Criminal Code*, s. 745
>
> 745. (1) Where a person has served at least fifteen years of his sentence

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(11) Manson (1990), at p. 267.

(12) Thomas O'Reilly-Fleming, "The Injustice of Judicial Review: Vaillancourt Reconsidered," *Canadian Journal of Criminology*, April 1991, p. 163.

(13) "600 Lifers Get Freedom Bid under Little-Known Law," *Toronto Star*, 2 June 1991.

(14) House of Commons, *Debates*, 6 May 1976, 1st Session, 30th Parliament, Vol. XIII, p. 13253.

(a) in the case of a person who has been convicted of high treason or first degree murder, or

(b) in the case of a person convicted of second degree murder who has been sentenced to imprisonment for life without eligibility for parole until he has served more than fifteen years of his sentence,

he may apply to the appropriate Chief Justice in the province in which the conviction took place for a reduction in his number of years of imprisonment without eligibility for parole.

(2) Upon receipt of an application under subsection (1), the appropriate Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced having regard to the character of the applicant, his conduct while serving his sentence, the nature of the offence for which he was convicted and such other matters as the judge deems relevant in the circumstances and the determination shall be made by no less than two-thirds of the jury.

(3) Where the jury hearing an application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought not to be reduced, the jury shall set another time at or after which an application may again be made by the applicant to the appropriate Chief Justice for a reduction in his number of years of imprisonment without eligibility for parole.

(4) Where the jury hearing an application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by order,

(a) substitute a lesser number of years of imprisonment without eligibility for parole than that then applicable; or

(b) terminate the ineligibility for parole.

(5) The appropriate Chief Justice in each province or territory may make such rules in respect of applications and hearings under this section as are required for the purposes of this section.

The remaining subsections define "the appropriate Chief Justice" for various jurisdictions and certain judges who may be designated to hear the application.

PROCEDURE FOR REVIEW

Because each provincial or territorial Chief Justice is given the responsibility for making the rules respecting the actual procedure to be followed in a review application, there is at least the potential for different processes in different jurisdictions. In Ontario, the rules allow the judge to order the preparation of a "parole eligibility report" and for a preliminary hearing to allow cross-examination on the report and to determine the evidence that will be heard by the jury. The Ontario rules also provide that the applicant must present his or her evidence first. The rules also disallow the presentation of evidence by persons other than the applicant and the Attorney General and allow the admission of any evidence that the judge considers credible and trustworthy.[15] While the rules in other provinces tend to be quite similar, they are not identical; for example, those in Saskatchewan and British Columbia do not specifically disallow evidence from third parties.[16]

CONSIDERATION OF EVIDENCE

In *Vaillancourt* v. *Solicitor General of Canada, etc. [Ont.]*, Associate Chief Justice Callaghan of the Ontario Supreme Court held that the review process "strikes a balance between considerations of leniency for the well-behaved convict in the service of his sentence, which may serve to assist in his rehabilitation, and the community interest in repudiation and deterrence of the conduct that led to his incarceration."[17] In addition, the persuasive onus is properly on the applicant "who is seeking to set aside an otherwise valid judicial order." Following René Vaillancourt's unsuccessful application, the Ontario Court of Appeal in 1989 ruled that it had no jurisdiction to hear an appeal from denial of a s. 745 review.[18] Although the Supreme Court of

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(15) *Ontario Rules of Practice Respecting Reduction in the Number of Years of Imprisonment Without Eligibility for Parole*, SOR/92-270, 11 May 1992.

(16) *Saskatchewan Rules of Practice Respecting Reduction in the Number of Years of Imprisonment Without Eligibility for Parole*, SOR/90-74, 9 January 1990; *British Columbia Rules of Practice Respecting Reduction in the Number of Years of Imprisonment Without Eligibility for Parole*, SOR/92-746, 15 December 1992.

(17) (1988), 66 C.R. (3d) 66 at p. 75.

(18) *R.* v. *Vaillancourt [Ont.]* (1989), 71 C.R. (3d) 43.

Canada held in 1990 that it had jurisdiction to hear M. Vaillancourt's application for leave to appeal, leave was nevertheless denied.[19]

In addition to the rules promulgated by the applicable Chief Justice, s. 745(2) provides general guidelines for a judge charged with conducting the application. According to that section, the jury is to make its decision based on the "character" of the applicant, his "conduct" while incarcerated, the "nature of the offence," and "such other matters as the judge deems relevant in the circumstances." The exercise of that judicial discretion has resulted in disparate rulings on the relevance and admissibility of certain kinds of evidence. For example, in *Vaillancourt* v. *Solicitor General of Canada, etc. [Ont.]*, Callaghan, A.C.J. excluded evidence of the practices and policies of the National Parole Board, on the basis that such evidence was not relevant to the jury's deliberations. In contrast, the British Columbia Supreme Court was prepared to admit evidence of Parole Board practices in order that the jury's decision not be made "in a vacuum."[20]

There appears to have been a similar divergence concerning the admissibility of evidence relating to the original offence. In Ontario, Callaghan, A.C.J., ruled that *vive voce* evidence about the offence was not admissible, apart from an agreed statement of facts, since "blameworthiness" was not in issue. While acknowledging that the jury could not rethink guilt or innocence, the British Columbia Supreme Court nevertheless expressed a willingness to hear about "extenuating circumstances" that might have borne on "the conduct of the individual engaged in the offence at the time."[21] Reference was also made in the *Boyko* case to a Manitoba review where the applicant's co-accused was apparently allowed to give evidence accepting responsibility for the original offence. Some of the foregoing evidential issues have since been canvassed by the Supreme Court of Canada in *R.* v. *Swietlinski*, discussed below.[22]

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(19) *R.* v. *Vaillancourt* (1990), 72 C.R. (3d) xxvi (S.C.C.)

(20) *In the matter of the Criminal Code, s. 745, and Brian John Boyko* (1990), Trainor J. (B.C.S.C., Vancouver Reg. No. CC891195).

(21) *Ibid.*

(22) [1994] 3 S.C.R. 481.

OUTCOME OF REVIEW APPLICATIONS

The accompanying table provides data concerning the status of applications for review under s. 745, as of 31 December 1995. Of 175 inmates who were eligible to seek a review, a total of 76 had applied and 13 of those applications were outstanding.[23] It is interesting to note that almost half (30) of the 63 completed applications were heard in Quebec, where all but two of the inmates involved were successful in having their period of parole ineligibility reduced. By contrast, 11 of 33 applications heard elsewhere were denied.

Although the numbers may be too small to identify any reliable trends, some commentators have speculated that the higher success rate for Quebec applications may be a reflection of cultural differences.[24] Others suggest that differing approaches by Crown Attorneys may explain the results, since Quebec prosecutors tend not actively to oppose s. 745 applications.[25] Even if they can be explained by different procedural rules and specific fact situations, high success rates in certain jurisdictions may well encourage more applications from those convicted there.

Applications for Judicial Review:
Status at 31 December 1995

a) Of the 175 offenders eligible to seek review under section 745 of the *Criminal Code*, 76 had made applications for hearings, of which 63 were heard.

b) Outcome of hearings:

Jurisdiction	Reduction of Restriction	Reduction Denied	Total
Nova Scotia	1	-	1
New Brunswick	1	-	1
Quebec	28	2	30
Ontario	7	4	11
Manitoba	4	1	5
Saskatchewan	2	1	3
Alberta	2	5	7
British Columbia	5	-	5
CANADA	50	13	63

(23) National Parole Board; *Policy, Planning and Operations*.

(24) Thomas Claridge, "Crime and Punishment," *Globe and Mail* (Toronto), 4 July 1992.

(25) Thomas Claridge, "Top Court to Weigh Parole Law on Killers," *Globe and Mail* (Toronto), 25 May 1994.

FUTURE CONCERNS

The rules in Ontario and several other jurisdictions would seem to preclude submissions coming from third parties of their own volition; however, the general nature of the wording in s. 745 leaves considerable discretion in the hands of the "designated" judge as to the nature of the evidence that may be considered relevant to the jury's deliberations.

In *R.* v. *Swietlinski*, O'Driscoll J. declared victim impact statements inadmissible in a s. 745 proceeding because they were intended to assist in the earlier sentencing process and were thus not relevant to the issue before the jury.(26) On appeal, a majority of the Supreme Court of Canada decided that victim impact statements were not "at all times inadmissible." Rather, the presiding judge would have the responsibility and discretion to determine the relevance and admissibility of such a statement in any given case. Amendments proposed in Bill C-41 would limit that discretion by adding "any information provided by a victim" to the list of factors to be considered by the jury in a review application.(27) The Supreme Court also held that the jury would have to consider the offender's past and present character, since "the purpose of the s. 745 proceeding is to reassess the penalty imposed on the offender by reference to the way his or her situation has evolved in 15 years." Furthermore, because the applicant is not to be punished for weaknesses in the system, it was not open to the jury to "determine whether the existing system of parole is doing its job."

Although the Supreme Court of Canada decision in Swietlinski has provided some guidance as to the nature of the evidence relevant to a s. 745 review and the appropriate balance to be struck by the jury in its deliberations, the courts are not well situated to resolve the more fundamental policy issues involved in the release of convicted murderers.

As some of Canada's more notorious offenders approach the fifteen-year point at which they will be eligible to initiate an application, Parliament faces increasing public pressure to

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(26) (1992), 13 C.R. (4th) 116 (Ont. Gen. Div.).

(27) "An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof." Section 745.6(2)(d) directs the court to consider information provided by the victim either at the time of sentencing or at the time of the review hearing. S.C. 1995, ch. 22, received Royal Assent on 13 July 1995 but had not been proclaimed in force as of 23 April 1996.

re-examine the fairness and efficacy of the existing law while balancing two often conflicting policy values: denunciation of the crime and rehabilitation of the offender.[28]

Two Private Members' bills introduced in the Thirty-Fourth Parliament called for later access or an end to parole eligibility reviews for convicted first degree murderers. Bill C-311 would have required those convicted of first degree murder to serve 20 years before review, while Bill C-330 would have eliminated s. 745 reviews for those inmates. Both bills would have left the review process intact for those convicted of second degree murder. Private Member's Bill C-226, introduced 17 March 1994, proposed the repeal of s. 745 to eliminate parole eligibility reviews altogether.[29]

Even those who oppose long parole ineligibility periods have called the s. 745 review process a "costly, unjust and inequitable" procedure that should be scrapped in favour of direct application to the Parole Board after 15 years have been served, so that prisoners saved from the gallows by abolition do not "languish in a hopeless and never-ending limbo of judicial procedures."[30] Certainly, the requirement that s. 745 reviews be heard in the jurisdiction in which the conviction took place can result in greatly increased costs for transporting out-of-province inmates and counsel. At the same time, however, the enormous economic and social costs of detaining inmates for prolonged periods cannot be ignored.

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(28) See "Should Clifford Olson Go Free?" *Times-Colonist* (Victoria), 17 March 1996; "Keep the Faint Hope," *Ottawa Citizen*, 4 April 1996.

(29) After Bill C-226 died on the Order Paper at prorogation, in February 1996, the same proposal was reintroduced as Bill C-234 on 12 March 1996.

(30) O'Reilly-Fleming (1991), at p. 169.

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